REPORT OF THE JUDGE-RAPPORTEUR in Case C-297/92 *

I — Legislative background

Article 9(2) of Regulation (EEC) No 1408/71 provides as follows:

'2. Where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of periods of insurance, the periods of residence or insurance completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State.'

Under Italian law, a worker whose employment has ended may, with the authorization of the INPS, continue to pay voluntary contributions. The only persons admitted to voluntary continued insurance are those who can show not less than five years' actual compulsory contributions under the Italian social security scheme at any time or not less than three years' contributions during the five years preceding the request for voluntary continuation.

Entitlement to invalidity benefits under Italian law is conditional on, first, five years having elapsed since the date on which the obligation to contribute arose and, secondly, the insured person's having contributed for five years, with at least one year's contributions having been made during the five years preceding the date of drawing the pension.

II — Facts and procedure

Corradina Baglieri, an Italian national, worked in the Federal Republic of Germany from 23 August 1965 to 4 April 1975. On that date she returned to Italy, where, on 17 December 1979, she applied to the INPS for leave to pay voluntary insurance contributions by way of continuation of the compulsory payments she made in Germany, in order to meet the minimum conditions for claiming an invalidity pension under the Italian scheme. She has never been employed in Italy.

On the basis of the abovementioned legislation, the INPS refused her request. She then brought proceedings before the Pretura di Siracusa (Magistrates' Court, Siracusa), claiming that her entitlement to an invalidity pension should be upheld. After finding, in an interim ruling, that the INPS had an obligation, under Article 9(2) of Regulation No 1408/71, to accept Mrs Baglieri's voluntary insurance contributions, the magistrate held, in its judgment in the main proceedings, that she was entitled to an invalidity pension.

* Language of the case: Italian.

The INPS appealed against this judgment to the Tribunale di Siracusa (District Court, Siracusa), which upheld it by judgment of 7 June 1990. The INPS lodged an appeal on a point of law against this judgment and Mrs Baglieri lodged a cross appeal. The Corte Suprema di Cassazione (Court of Cassation) dismissed the cross appeal and, by order No 512/92 of 12 July 1992, suspended the proceedings and referred the following question to the Court:

'Is Article 9(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971, in so far as it provides that "the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State" to be interpreted as meaning that a worker may be admitted to voluntary continued insurance even if he has not completed, in a number of Member States, including the Member State in which the request is made, different periods of insurance that can be aggregated but has completed a single previous period of employment as a migrant worker in one other Member State and has obtained in that State the relevant compulsory insurance required for admission to voluntary insurance in the State in which he has requested admission to voluntary continued insurance?'

The court making the reference points out that it is aware of the interpretation given by the Court of Justice of Article 9(2) of Regulation No 1408/71 in Case 70/80 *Vigier* v *Bundesversicherungsanstalt für Angestellte* [1981] ECR 229. It considers, however, that it has grounds for asking the Court to reconsider that judgment. First, 10 years have elapsed since that judgment and the Community is required to complete further stages shortly, above all the abolition of all limitations on the freedom of movement of workers within the Member States; secondly, to follow the restrictive interpretation given in that judgment could lead to infringement of the principles of the Treaty governing the free movement of workers and their social security; finally, a broader interpretation appears to the national court to be in keeping with the letter and the spirit of an Italian law (Law No 398 of 3 October 1987) concerning the protection of Italian migrant workers working in non-Community countries, which allows contributions by these workers. If the restrictive interpretation were to be retained, this could result in some migrant workers being placed at a disadvantage, depending on the Member State or the non-member country in which they work.

III — Procedure before the Court

The order for reference was received at the Court Registry on 7 July 1992.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the appellant in the main proceedings, the INPS, represented by Carlo De Angelis, Avvocato, and the Commission of the European Communities, represented by Antonio Aresu, of its Legal Service, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, pursuant to Article 104(4) of the Rules of Procedure, not to hold an oral procedure.

IV — Written observations submitted to the Court

1. The Commission observes that the question raised must be answered on the basis of Article 9(2) of Regulation No 1408/71. That article clearly lays down the principle that contribution periods completed in different Member States must be aggregated, with the result that the social security institutions in each State where a person has worked must take account, for the purposes of granting entitlement to benefits and calculating them, of all periods of insurance completed by the person concerned in the various Member States.

In the present case, however, it is necessary to determine whether that provision is applicable with a view to the admission of a person to continued insurance in a Member State where she has never worked or paid contributions.

The Commission refers to several judgments of the Court (Case 266/78 *Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, paragraphs 5 and 6; Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445, paragraphs 12 and 13; *Vigier*, cited above; Case 254/84 *De Jong* v *Sociale Verzekeringsbank* [1986] ECR 671, paragraphs 14 and 15; Case 284/84 *Spruyt* v *Sociale Verzekeringsbank* [1986] ECR 685, paragraphs 18 and 19; Case 43/86 *Sociale Verzekeringsbank* v *De Rijke* [1987] ECR 3611, paragraphs 13 and 14; Case 29/88 *Schmitt* [1989] ECR 581; and Case 368/87 *Hartmann Troiani* v *Landesversicherungsanstalt Rheinprovinz* [1989] ECR 1333, paragraphs 15, 16 and 17) and reaches the conclusion that Article 9(2) has been sufficiently clarified by settled case-law to the effect that (a) each system of national law determines the conditions for affiliation to the various national schemes and (b) the fact that a person has worked in a Member State and has completed periods of compulsory insurance there does not entitle him to obtain affiliation to a social security scheme in another Member State where he has never worked. In particular, the Commission lays stress on the *Vigier* case (cited above) in view of the similarity of the facts with those of the present case, and quotes paragraph 20 of that judgment:

'Article 9(2) of Regulation No 1408/71 must be construed as meaning that it does not require a social insurance institution of a Member State to take into account periods of insurance completed under the legislation of another Member State when the worker concerned has never paid, in the first Member State, the contribution required by law in order to create his status as an insured person under the legislation of that Member State.'

The Commission adds that the more recent judgment in *Hartmann Troiani* is to the same effect, although worded slightly differently:

'(...) Article 9 of Regulation No 1408/71 must be construed as meaning that the requirement of affiliation to a compulsory insurance scheme in a Member State, which according to the legislation of that State must be fulfilled at the time of the submission of an application to make retroactive payment of voluntary pension-insurance contributions, cannot be considered to be satisfied if the person making the application is at that date affiliated to a compulsory insurance scheme in another Member State.'

The Commission then makes a number of observations concerning the national court's comments with regard to the excessively

restrictive nature of the approach taken in the case-law.

With regard to the *impending removal of all obstacles to the free movement of workers within the Member States and the fact that 10 years have elapsed since the Vigier judgment*, the Commission admits that there is a new legal context. In this connection it mentions the second paragraph of Article 8a of the Treaty (the establishment by 31 December 1992 of an internal market comprising an area without internal frontiers in which, *inter alia*, the free movement of persons is ensured); the three directives which provide for a general right of residence in the territory of the Member States for persons from another Member State (Council Directives 90/364/EEC, 90/365/EEC and 90/366/EEC, all of 28 June 1990, OJ 1990 L 180, pp. 26, 28 and 30 respectively); the Community Charter of Fundamental Social Rights adopted pursuant to Article 117 of the EEC Treaty at the meeting of the European Council in Strasbourg on 9 December 1989, the first paragraph of point 10 of which refers to the importance of the right of every European worker to 'adequate social protection', and, finally, the Commission's proposal to extend the scope of Regulations Nos 1408/71 and 574/72 to include all persons insured under the various national social security schemes (OJ 1992 C 46, p. 1).

However, the Commission considers that this new context has not brought about any changes in regard to the legal bases and the basic principles of the coordination of national social security schemes as compared with the legal situation on which the above-mentioned case-law of the Court was based.

With regard to the *possible violation of the principles of the Treaty governing the free movement of workers in the Community and their social security*, the Commission contends that the interpretation by the Court of Regulation No 1408/71, particularly in the judgment in Case 100/63 *Kalsbeek* v *Sociale Verzekeringsbank* [1964] ECR 565, first paragraph of section II, and followed in Case 4/66 *Labots* v *Raad van Arbeid Arnhem* [1966] ECR 425, Case 1/67 *Ciecheeski* [1967] ECR 181 and Case 191/73 *Niemann* v *Bundesversicherungsanstalt* [1973] ECR 571, is in conformity with the spirit of Article 48 et seq. of the Treaty. The Commission infers from this case-law that it follows from Article 51 of the Treaty that a migrant worker who has worked in more than one Member State can never lose entitlement to social security benefits because periods of insurance completed under different national schemes must be aggregated as if they had been completed in a single State. The Commission reaches the conclusion that, if the aggregation rules can never produce unfavourable effects by comparison with the situation in which the worker would have been in one Member State in the absence of aggregation, the converse must also be true: aggregation cannot have the effect of giving to a migrant worker advantages superior to those which he would have obtained under the legislation of the reference Member State (on this point the Commission cites the *Niemann* judgment, paragraphs 5, 6 and 7).

The Commission observes that the Court always refers to a specific national scheme and not to a general 'Community scheme' because 'the regulations did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law' (Case

100/78 *Rossi* v *Caisse de Compensation pour Allocations Familiales des Régions de Charleroi et Namur* [1979] ECR 831, paragraph 13, followed in Case 733/79 *Caisse de Compensation pour Allocations Familiales des Régions de Charleroi et Namur* v *Laterza* [1980] ECR 1915, paragraph 8; Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205, paragraph 7; and Case 232/82 *Baccini* v *Office National de l'Emploi* ('*Baccini II*') [1983] ECR 583, paragraph 17). The Commission adds that it is national law, and national law alone, which confers a legal entitlement to social security benefits and that affiliation is an essential condition for obtaining them (in this connection it cites Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraphs 20 and 21, and Case C-186/90 *Durighello* [1991] ECR I-5773, paragraphs 14 and 15). In the present case, however, Mrs Baglieri has never been affiliated to an Italian social security scheme and she is unable to fulfil precisely the prior condition for applying the Community aggregation rule.

The Commission contends that she cannot overcome the fact that it is impossible to obtain what she claims on the basis of the interpretation of Article 9(2) of Regulation No 1408/71 by relying on Articles 48, 51 and 118 of the Treaty, as the order making the reference might suggest. The Commission justifies this by three arguments. First, Article 9(2) is the specific law (*lex specialis*) in this matter. Secondly, the existence of an independent legal basis seems to the Commission to be incompatible with the *Rossi* judgment cited above, which states that there is no common scheme of social security, but '*different* schemes creating *different* claims on *different* institutions'. Finally, in the *Troiani* judgment, cited above, the Court held that it is for the Member State to determine the conditions of affiliation to a social security scheme, provided that there is no discrimination on grounds of nationality.

With regard to *some migrant workers being placed at a disadvantage, depending on the Member State or the non-member country where they work*, the Commission observes that Italian Law No 398 of 3 October 1987 provides for a special social security scheme for workers who have migrated to non-member countries, which is not relevant to the present case. The Commission considers that an Italian working in Germany could potentially be in a less favourable situation than another worker in a non-member country with which Italy has not concluded a bilateral agreement, but stresses that this situation is not a matter for Community law.

Finally, the Commission, considering that the Court's interpretation of Article 9(2) is still valid, proposes that the following reply be given to the Corte Suprema di Cassazione:

'Article 9(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community must be interpreted as meaning that the condition of affiliation to a compulsory social security scheme in a Member State — a condition which, under the legislation of that Member State, must be fulfilled at the time when the person concerned asks to be allowed to make voluntary invalidity-insurance contributions — cannot be considered to be satisfied where the person making the request has not completed any period of compulsory insurance necessary for acquiring the status of an insured person under the social legislation of that Member State, but

has previously completed only one period of employment in another Member State, where he can show one period of compulsory insurance equal to the number of years' work which he has completed there.'

2. The INPS observes that Article 9(2) has always been interpreted by the Corte di Cassazione as meaning that it takes account of the periods completed for the purposes of aggregation and adds that the Court of Justice also has also interpreted it in the same way (see the judgment in *Vigier*, cited above). The INPS considers that the relevant case-law is justified because the provision in question provides for the aggregation of periods of insurance only for the purposes of fulfilling the conditions laid down by national law. In the present case, however, no insurance contribution has been made to the Italian scheme.

According to the INPS, this interpretation is confirmed by Article 13(2)(e) of Regulation No 1408/71, which permits the aggregation of periods of insurance abroad and the notional contribution credited in Italy for military service. This provision reads as follows:

'a person called up or recalled for service in the armed forces, or for civilian service, of a Member State shall be subject to the legislation of that State. If entitlement under that legislation is subject to the completion of periods of insurance before entry into or after release from such military or civilian service, periods of insurance completed under the legislation of any other Member State shall be taken into account, to the extent necessary, as if they were periods of insurance completed under the legislation of the first State. (...)'

The INPS argues that this provision is an exception to the Community system, which is justified by the particular nature of the notional contribution in question. This exception was necessary in order to enable, for example, a notional contribution to be credited in Italy to persons who do not have the status of compulsorily insured persons there and who have completed a period of national service. This exception is said to confirm the rule of the system, which is based on the conditions required by national law.

The INPS also observes that some provisions in the agreements concluded by Italy with Sweden, Switzerland and Liechtenstein are the only ones which permit voluntary contributions to be paid in Italy only on the basis of contributions paid abroad.

With regard to the national court's question of whether the interpretation of Article 9(2) can remain valid 'in view of the impending deadlines which the Community has to meet and, above all, the forthcoming elimination of all obstacles to the free movement of workers in the Member States', the INPS observes that this is a question of *lege ferenda*, which cannot cause the provision at issue to have a meaning which it does not have. The INPS considers that there is also a contradiction between the position taken by the Corte di Cassazione in judgment No 2033/88, where it took the view that Article

9(2) was a provision which did not require interpretation, and its present position in favour of a different interpretation. The outcome of this would be to cause Article 9(2) to say something other than what it does say, which has been held by the Corte di Cassazione not to require interpretation.

Regarding the national court's observation that a broad interpretation would be in keeping with the letter and the spirit of Italian Law No 398 of 3 October 1987, the INPS stresses that that law applies to Italian workers working in non-Community countries with which there are no agreements, and that the provision setting out the criteria for determining and paying contributions was adopted in order to release employers from the burden of double contributions. The INPS also doubts whether the Italian State would pass such a law today.

The INPS concludes by asking the Court to rule that Article 9(2) of Regulation No 1408/71 must be interpreted as meaning that

'it takes account of periods of employment completed in more than one Member State "for the purposes of aggregation", but not for the purposes of deeming a worker, in respect of periods of insurance completed in another Member State, to be compulsorily insured in Italy, where he requests voluntary continuation; consequently, pursuant to Article 5 of Law No 218 of 4 April 1952 and Article 11 of Law No 1338 of 12 August 1962, as subsequently supplemented and amended, the compulsory contributions paid by Mrs Baglieri in the Federal Republic of Germany alone cannot be taken into account for the purposes of voluntary continued insurance in Italy'.

J. C. Moitinho de Almeida
Judge-Rapporteur